

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-7234

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BARBARA BOYD, et al., on behalf of themselves :
and all other persons similarly situated, :

Plaintiffs-Appellants, :

-against- :

THE JUSTICES OF SPECIAL TERM PART I, OF THE SUPREME :
COURT OF THE STATE OF NEW YORK, BRONX COUNTY, :
individually and in their official capacities, et al., :

Defendants-Appellees. :
-----X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

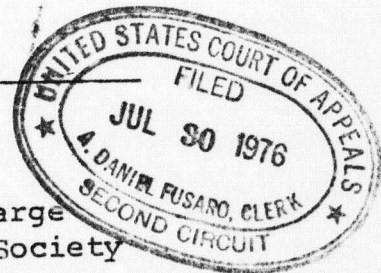
JOINT APPENDIX ON APPEAL

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PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX

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DOCKET ENTRIES IN DISTRICT COURT

SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, ETC. ETAL

PG. 2.

DATE	NR.	PROCEEDINGS	DUFFY, J
12-16-75	(1)	Filed Complaint and issued summons.	
12-16-75	(2)	Filed Order granting commencement and prosecution of this action in forma pauperis. WERKER, J	
12-26-75	(3)	Filed Order appointing Clinton Thomas as process server. CLERK.	
12-31-75	(4)	Filed plttfs' notice of motion for an order pursuant to Rule 23 (c) (1) FRCP for class action certification and convening a Three-Judge Court. Ret. 1-13-76	
12-31-75	(5)	Filed plttfs' brief in support of motion for class action certification and convening of Three-Judge Court.	
12-31-75	(6)	Filed summons and affdvt. of service by an individual- served the following: Hon. David Ross by Margarite Watson on 12-17-75 Hon. Edward Thompson by Mark Rogart on 12-11-75 Hon. Edward Dudley by Calvin Connell on 12-17-75 Hon. Louis Fusco, Jr. by Albert Cerussi, Jr. on 12-17-75 Justices of Special Term, Part 1 of the Supreme Court of the State of N.Y. Bronx County by Hon. David Ross by Margarite Watson on 12-19-75 Hon. Hugh L. Carey by Clarence Sandran on 12-19-75	
01-14-76	(7)	Filed stip & order extending defts' time to answer to the complaint to 01-27-76. So ordered- DUFFY, J.	
02-03-76	(8)	Filed defts' affdvt. and notice of motion for an order dismissing the complaint pursuant to Rule 12(b) FRCP. Ret. 02-17-76	
02-03-76	(9)	Filed memorandum of law in support of defts' motion to dismiss and in opposition to motions for convening a three-Judge court and class certification.	
02-11-76	(10)	Filed stip & order extending defts' time to answer to the complaint to 02-03-76. So ordered- DUFFY, J.	
02-25-76	(11)	Filed plttfs' supplemental brief in support of motion for class action certification and convening of three-Judge Court and in opposition to defts' motion to dismiss.	
03-26-76	(12)	Filed reply memorandum of law in support of defts' motion to dismiss and in opposition to plttfs' motion for convening a three-judge court and class certification.	
04-20-76	(13)	Filed plttfs' brief in answer to defts' reply memorandum of law.	
04-21-76	(14)	Filed memorandum and Order-- the complainants have moved for class determination and for a ruling that the defts. must appoint attys for indignets involved in divorce proceedings. The Attorney General has informed me that N.Y. State law already provides for the relief which the plttfs. seek. It would appear therefore that there is not a case or controversy and, accordingly, the matter is dismissed. It is so ordered- DUFFY, J. (m/n)	
05-11-76	(15)	Filed plttfs' notice of appeal to the USCA from the order dated and entered 4-20-76. Copy to : Louis J. Lefkowitz, Atty. General, State of N.Y. Ent. 5-11-76	

THOMAS P. DUFFY, Clerk
By: *[Signature]*
Deputy Clerk

PLAINTIFFS' CLASS ACTION COMPLAINT

[caption omitted]

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202, and Rules 23, 54, 57, and 65 of the Federal Rules of Civil Procedure to protect certain rights, privileges and immunities secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

2. By this proceeding plaintiffs seek, on behalf of themselves and all others similarly situated, a judgment declaring that indigent divorce plaintiffs and defendants unable to obtain counsel have a constitutional right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the assignment of counsel in divorce actions.

3. By this proceeding plaintiffs seek, on behalf of themselves and all others similarly situated, a judgment

declaring that Section 1102(a) of the New York Civil Practice Law and Rules (hereinafter CPLR), as applied to plaintiffs and class members, is violative of the constitutional right to the assignment of counsel secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment for indigent divorce plaintiffs and defendants who are unable to obtain counsel.

4. By this proceeding plaintiffs seek, on behalf of themselves and all others similarly situated, a permanent injunction restraining the defendants from refusing or failing to assign counsel to indigent divorce plaintiffs and defendants who are unable to obtain counsel, and restraining the defendants from enforcing, applying, or relying on CPLR §1102(a) to refuse or fail to assign counsel to indigent divorce plaintiffs and defendants who are unable to obtain counsel.

5. Declaratory and injunctive relief are necessary and appropriate since plaintiffs and plaintiff class members will otherwise suffer irreparable injury for which there is no adequate remedy at law.

6. Determination of this action requires the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 since the plaintiffs herein seek, on behalf of

themselves and all others similarly situated, an injunction restraining the operation, execution, and enforcement of CPLR §1102(a), as applied to plaintiffs and plaintiff class members, upon the ground of its unconstitutionality, by restraining the actions of the defendants, officers of the State, in enforcing, executing, or relying on said statutory provision to fail to assign counsel to plaintiffs and plaintiff class members as indigent divorce plaintiffs and defendants who are unable to obtain counsel.

JURISDICTION

7. Jurisdiction over this suit is conferred upon this Court by 28 U.S.C. §1343(3) as an action to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the United States Constitution.

CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and, in addition, Rule 23(b)(2) or, in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

9. The plaintiff class is composed of all indigent persons who are or will be plaintiffs or defendants in divorce actions brought in the Supreme Court of the State of New York, Bronx County, and who are unable to obtain counsel.

10. This class action is properly brought pursuant to Rule 23 because: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class, namely, whether there is a federal constitutional right to the assignment of counsel for indigent divorce plaintiffs and defendants who are unable to obtain counsel, and whether CPLR §1102(a) is unconstitutional in failing to require the assignment of counsel for indigent divorce plaintiffs and defendants who are unable to obtain counsel; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class; (d) The Legal Aid Society of New York City, counsel for the plaintiffs, has legal resources and experience adequate to protect all members of the class and will fairly and adequately protect the interests of the class; (e) the defendants, in refusing and failing to assign counsel to plaintiffs and plaintiff class members as indigent divorce plaintiffs and defendants unable to obtain counsel, act and refuse to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief and corresponding declaratory relief with respect to the class as a whole; (f) the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would create a risk of adjudications with respect to individual members of the class that might as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

STATUTORY SCHEME

11. CPLR §1102(a) provides that a court of the State of New York "in its order permitting a person to proceed as a poor person may assign an attorney."

12. As construed by the highest court of the State of New York, CPLR §1102(a) does not entitle an indigent divorce plaintiff or defendant who is unable to obtain counsel to the assignment of counsel, and permits the denial of assignment of counsel to such a litigant.

DEFENDANTS

13. Defendant JUSTICES OF SPECIAL TERM, PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, have judicial power and responsibility with respect to the assignment of counsel to divorce litigants in Bronx Supreme Court.

14. Defendant Judges DAVID ROSS, EDWARD THOMPSON, EDWARD R. DUDLEY, and LOUIS FUSCO, JR., have administrative power and responsibility over the Justices of Special Term, Part I, of the Bronx Supreme Court and hence over the assignment of counsel to divorce litigants in Bronx Supreme Court.

15. Defendant HUGH L. CAREY is Governor of the State of New York and pursuant to Article IV, Section 3, of the New York State Constitution is obligated to "take care" that all laws, including CPLR §1102(a), are "faithfully executed."

NAMED PLAINTIFFS

16. Each of the first twelve named plaintiffs is a Bronx resident who wishes and intends to commence an action for divorce against his or her spouse. All twelve have resided in New York State in excess of two years, giving juris-

diction in the New York courts over the proposed actions under the New York Domestic Relations Law. All twelve have disclosed a factual history establishing prima facie grounds for divorce under New York law.

17. Each of the twelve has an urgent need for a divorce and requires the assistance of counsel in the prosecution of his or her divorce action. None has any legal training or experience and several speak and read only Spanish.

18. Each of the twelve is a person who cannot afford to retain an attorney to advise and represent him or her in the prospective action, being a recipient either of public assistance from the New York Department of Social Services in the Aid to Dependent Children category (9 cases); or unemployment insurance benefits from the New York State Department of Labor (2 cases); or court-ordered support payments from the spouse (1 case).

19. Each of twelve has been unsuccessful in obtaining an attorney despite diligent efforts to do so. Each has requested -- and been refused -- a referral to a private attorney by the legal referral services of both the Bronx County Bar Association and the New York County Bar Association, on the ground that the individual cannot afford to pay a fee. Each has been refused assistance by South Bronx Legal Services, 579 Courtlandt Avenue, and Morrisania Legal Services, 1438

Boston Road, the Bronx, on the ground that these offices do not accept divorce cases. Each has been refused service by The Legal Aid Society, 1029 East 163rd Street, Bronx, for the reason that, while the office does accept cases of divorce and the individuals qualify financially for the services of the office, it lacks sufficient resources and manpower to accept new matters in addition to its current heavy docket of pending cases.

20. Of these twelve plaintiffs, the first 10 named in the caption have been assisted by the Legal Aid Society in submitting to Special Term, Part I, of the Bronx Supreme Court, ex parte applications for leave to commence divorce actions as poor persons and for assignment of counsel pursuant to CPLR §1102(a) to represent them in such actions without fee. Under the Court's decision in Matter of Boyd, published in the New York Law Journal, November 6, 1975, page 10, col. 2, and attached hereto, each of these 10 named plaintiffs was granted permission to proceed as a poor person without payment of court costs; but in the absence of statutory authorization to compensate assigned attorneys in such cases, the Court denied their request for assignment of counsel pursuant to CPLR §1102(a) to advise and represent them in the proposed actions.

21. The situations of the remaining two named plaintiffs of the first twelve (STELLA PALMER and VALERIA HARDING) parallel those of the first ten, with the single exception that, having requested the assistance of The Legal Aid Society in procuring an attorney for their proposed actions for divorce subsequent to the Bronx Supreme Court's refusal to assign counsel to 61 others in Matter of Boyd, they have not likewise made application to the Court for such assignments. In view of the result for the 61, further applications would plainly be futile.

22. The last named plaintiff is a divorce defendant who requires the assistance of counsel to defend in the pending divorce proceeding. Her efforts to obtain counsel have been unavailing and her application for assignment of counsel pursuant to CPLR §1102(a) was denied in the Bronx Supreme Court.

23. All of the named plaintiffs share an urgent need for the assistance of counsel, either to commence and prosecute their prospective actions for divorce, or, in the case of the last named plaintiff, to defend a pending action. None of the plaintiffs has any legal training or experience; moreover three of the named plaintiffs (including Carlota Barrera, the divorce defendant) speak no English. Consequently,

as expressly found by the Court in Matter of Boyd, supra, none is able to prosecute or defend an action for divorce pro se. None is knowledgeable of, or in a position to advance and protect, his or her substantive rights relating to causes of action for divorce, legal defenses thereto, rights to alimony, child support, custody and visitation of children, and other collateral issues such as division of jointly held property. None is aware of, familiar with, or able to follow through the numerous and complex procedural steps necessary to prosecute or defend a matrimonial proceeding, in which parties are almost invariably represented by counsel, formal rules of evidence are in force, important rights may be lost if not timely raised, and proof requirements are more stringent than in other types of civil actions. The formal procedures entailed in an action for divorce include: preparation and service of summons and affidavit of service; preparation of pleadings, including verified complaint (evaluation and pleading of jurisdictional facts and causes of action), and verified answer (pleading of denials, admissions, common-law and statutory defenses, and counterclaims); preparation of demand for bill of particulars (particularly in cases involving allegations of cruel and inhuman treatment); preparation of

pre-trial motions, including motions for poor-person relief, motions for temporary alimony, child support, possession of family domicile, or order of protection, and motions to the pleadings; preparation of discovery practice (particularly where a hostile witness is involved and the evidence lies peculiarly within the knowledge of the witness); handling of negotiations with respect to the causes of action in chief and collateral issues; calendaring the case, including preparation and service of note of issue and affidavit of regularity; trial preparation including strategy considerations, fact and evidence gathering, preparation and service of necessary subpoenas, and preparation of witnesses for direct and cross examination; trial litigation, including elements of proof, introduction of evidence and elicitation of testimony, and direct and cross examination of witnesses; and, finally, post-trial procedure including preparation of findings of fact, conclusions of law, and proposed judgment (for which is necessary a reading, understanding and interpreting of the trial transcript).

23a. BARBARA BOYD was married on June 1, 1961 in Halifax County, Virginia. She and her husband, Willie Lee Boyd, resided together until February, 1971. Today, she lives

at 970 Tinton Avenue, Bronx, New York, with her five children: Timothy, age 13; Barbara, 11; Vera, 10; Cynthia, 9; and Belinda, 6. Her sole source of income is a semi-monthly grant from the Department of Social Services in the amount of \$260.55, out of which she must pay \$200.00 per month rent and provide food, clothing and other living expenses for herself and her children. She has been a resident of New York for 12 years. Mrs. Boyd's prospective divorce action is grounded on cruel and inhuman treatment and constructive abandonment. During the period she lived with her husband, he drank heavily and beat her frequently when intoxicated. His repeated assaults caused Mrs. Boyd and her children to develop nervous conditions; one daughter, Vera, was hospitalized with peptic ulcers. In February, 1971, under order of the Family Court, Bronx County, her husband left the home. He has not returned since, nor has he supported his wife or children.

24. NOEMI TORRES was married on October 27, 1951 in New York City. There are five issue of the marriage, including Juan, age 23 (legally adopted); Iris, 22; Bonifacio, Jr., 20; Edwin, 13; and Mary Lee, 7. In 1969, her husband, Bonifacio Torres, left the household. A Family Court order gives

custody of the children to Mrs. Torres, with Saturday visitation to her husband. In December, 1971, he entered the home at 1490 Jessup Avenue, in the Bronx, provoked an argument with Mrs. Torres, and pulled her hair and struck her with his open hand. In March, 1972, in an argument over child support, he shouted at her and threatened to burn down her apartment. In July, 1975, he entered Mrs. Torres' home screaming at her, took her into the bedroom, punched her in the chest, threw her against the bed and threatened to "blow her head off." Mrs. Torres, who is an epileptic, has developed a chronic nervous condition as a result of her husband's continual assaults. She has been advised to seek a divorce by her psychiatrist at the Bronx Mental Health Center, where she receives regular out-patient treatment. In July, 1975, her husband, without her knowledge or consent, withdrew the balance of approximately \$3000 maintained in a joint savings account and has withheld all of the proceeds from her. Recently he has threatened to forceably take Mary Lee, the youngest child of the marriage, out of school and into his own custody despite the court order granting custody of the children to the mother. Mrs. Torres subsists on a \$114.00 semi-monthly grant from the Department of Social Services, and \$35.00 per week in court-ordered child support payments.

25. CARMEN VIGO was married on December 5, 1973 in New York City. She has one child, Michelle, born February 5, 1975. Mrs. Vigo, who is separated from her husband, subsists solely on a grant from the Department of Social Services in the amount of \$178.00 every two weeks. Mrs. Vigo's cause of action for divorce is based on cruel and inhuman treatment. On July 1, 1974, at a time when she was three months' pregnant, her husband, Raul Vigo, dragged her out of his car at Orchard Beach, injuring her leg. On July 4, 1975, he punched her in the face, grabbed her by the neck and tried to choke her. Since the couple separated in the summer of 1974, Raul Vigo has not supported his wife and child; he has, however, threatened to take custody of the child.

26. HELEN JOHNSON was married in Camden, New Jersey, on July 4, 1970. She lives at 547 East 178 Street, Bronx, New York with her seven-year old daughter, Katrina. She receives \$126.00 semi-monthly from the Department of Social Services, and pays \$132.70 per month rent. Mrs. Johnson's action for divorce is grounded on her husband's imprisonment for three or more years. The defendant, Samuel Johnson, was convicted of murder in the Supreme Court, Bronx County, and is presently serving a 25 years to life sentence in state prison.

27. CARMEN CASTANEDA was married on January 31, 1973 in the Bronx. She lives at 2304 Sedgwick Avenue, Bronx, New York, with her son, William, age 2. She receives \$117.00 semi-monthly from the Department of Social Services and \$165.00 per month from the Social Security Administration for SSI. Her rent is \$140.00 per month. Mrs. Castaneda's action for divorce is based on cruelty and adultery. In January, 1974, she found her husband, clad only in underwear, in his mother's apartment with another woman. On other occasions she has seen them kissing and holding hands in public. Her husband is openly living with the woman in his mother's apartment at the present time, and is not supporting Mrs. Castaneda and her child.

28. AWILDA CEDENO was married on September 11, 1970 in New York City. There is one child of the marriage, a son, David, age 3. Mrs. Cedeno lives at 1575 Grand Concourse, Bronx, New York with her son and two other children not of the marriage, ages 5 and 7. She subsists on a grant of \$154.00 every two weeks from the Department of Social Services. She receives no support from her husband. Her action for divorce is based on cruel and inhuman treatment. Since the

inception of the marriage, her husband, Colon Clay Cedeno, repeatedly became intoxicated, began arguments, and physically abused her, often pushing her against the wall. Since their separation, the defendant visits their son on Saturdays, and while he has never carried out the threat, has told Mrs. Cedeno he intends to take the child away permanently. She wants a judgment of divorce that includes an award of custody to her, and an alimony and child support commensurate with his ability and her needs. Mrs. Cedeno speaks and reads only Spanish.

29. ROSA AGOSTO was married on November 24, 1956 in the Bronx. She resides at 1236 Clay Avenue, Bronx, New York, with her three children, Luis, age 18; Rose Marie, 17; and Jose, 16. Mrs. Agosto's intended action is based on cruel and inhuman treatment. On June 30, 1974, her husband tried to break into her apartment through the fire escape window. When he was unable to enter because of a protective iron railing, he threatened to cut her face with a knife, to kill her and the children, and to burn down the building. On another occasion, on July 24, 1974, he again attempted to enter the apartment -- this time by trying to break down the entrance door. From 1969 to the present date, Mrs. Agosto

has obtained six separate orders of protection from the Family Court, Bronx County, under which the defendant is directed to stay away from the house, and to cease his threats, menacing and harassment of his wife and children. Mrs. Agosto's sole means of support is a grant from the Department of Social Services in the sum of \$217.40 semi-monthly. Her husband contributes no support. She speaks only Spanish, and neither reads nor writes in the English language.

30. MARIAM JOHNSON was married on May 7, 1973 at New Delhi, India. There is one child of the marriage, a son, Sunjay, age 21 months. She resides at 1595 Metropolitan Avenue, Bronx, New York. Mrs. Johnson intends to sue for divorce based on cruel and inhuman treatment, or in the alternative, for annulment based on her consent to the marriage under fraud, force and duress. She is a citizen of India, and a permanent resident of the United States. In early 1972, she returned to the home of her step-family in India for a vacation. While she was there, a friend, without her knowledge or consent, placed her name in one of India's newspapers to advertize her availability for marriage. Henry Johnson, now her husband, answered the advertisement after she had returned to New York. He was given her address in New York, and they

began to correspond. Johnson told her he was a "professor" and an "officer" and that he owned a house in India where they could live after they were married. He sent a picture purporting to be of himself, but in fact being of someone else. After a year of correspondence, they agreed to meet in India to plan a marriage. When she arrived at the airport, she was met by a man who told her he would take her to her husband-to-be. He took her to a hotel room and there disclosed that he was Henry Johnson. He was not the person whose picture she received; nor was he a "professor" or an "officer." He held her for a week in the hotel room, forcing her to have sexual intercourse with him. After a week, Johnson threatened to kill her if she did not marry him, and on the day of the marriage, he repeated his threat to kill her if she ran away. Four of his friends were present at the marriage ceremony. For the following month and a half, Johnson kept her locked in an apartment, fed her irregular meals at his pleasure, beat her, and threatened to kill her if she tried to seek help. When he released her, she returned to New York, where she now lives with her 21-month-old child of the marriage. She currently subsists solely on unemployment insurance benefits in the amount of \$95.00 per week. She receives no support from her husband.

31. FRANCISCO SEDA was married on March 10, 1970 in the Bronx. There is one minor child of the marriage, Monique, age 5, who is in the custody of her mother. His proposed action for divorce is grounded upon cruel and inhuman treatment. In March, 1971, his wife, Diane Seda, in his words, "threw him out of the house." He returned briefly in July, 1971, when she compelled him to leave again. For many months prior to their separation, she refused to have sexual relations with him; yet, before being shipped overseas with the United States Marine Corps he learned that his wife was pregnant by another man. Mr. Seda now resides with his father at 1023 Longwood Avenue, the Bronx, and receives unemployment insurance benefits in the amount of \$76.00 per week. He supports his daughter with small contributions to the extent that he is currently able.

32. GLORIA SIMONS was married on November 2, 1962 in the Panama Canal Zone. There are two children of the marriage, Karl, age 8, and Camille, age 4. Mrs. Simons resides with her husband, Rudolf, who is an installer with the New York Telephone Company. Despite the fact that he earns between \$275.00 and \$300.00 per week, he has refused to support her beyond paying the rent and giving her infrequent, small sums

that are insufficient in amount to provide for food, clothing and other needs of the family. As a result of his nonsupport, she has received assistance from the Department of Social Services, and has obtained a support order from the Family Court, Bronx County, under which he is to pay her \$50.00 per week for necessary expenses. Her husband has refused to comply with the order from September, 1975 to the present time. Mrs. Simons' action for divorce is based on cruel and inhuman treatment. In July 1971, her husband struck her on the head with a telephone receiver, while she was holding her infant daughter in her arms. The injury required treatment at the Bronx Municipal Hospital Center. Subsequently, on various occasions, her husband has threatened her with hot liquid, a hammer and an industrial staple gun.

33. STELLA PALMER was married on August 17, 1968 in the Bronx. There is one child of the marriage, Lafyah, age 7, who is presently residing with his maternal grandfather. Mrs. Palmer's prospective action for divorce is grounded upon cruelty and constructive abandonment. During the period she lived with her husband, James Palmer, he beat her frequently and subjected her to continual verbal abuse. In August, 1968, one week after the marriage, in an argument about money, Palmer beat her with his fists in the street, and stopped

only when his brother pulled him off her. The following October, when Mrs. Palmer was pregnant, he pushed her down the stairs in the apartment building where they resided, necessitating treatment for her injuries at Bronx Lebanon Hospital. As a result of these beatings, she was forced to leave the household. Mrs. Palmer presently resides at 340 Beekman Avenue, Bronx, New York, with her 5-month-old son (not of the marriage) Carey Canteen. She receives \$138.40 semi-monthly from the New York City Department of Social Services. Her husband contributes no support to the household. Unlike the 12 previously named plaintiffs, she has not applied to the Supreme Court, Bronx County, for assignment of counsel in her proposed action, because of its futility.

34. VALERIA HARDING was married on March 3, 1969 in New York City, and resides now at 2763 Sedgwick Avenue, Bronx, New York. There are two children of the marriage, Ronda, age 6, and Alec, age 4. Her intended action for divorce against her husband, Ronald Earl Harding, is based on his abandonment for one or more years. He left the household on November 17, 1972 and has not returned. Mrs. Harding lives on a \$195.00 semi-monthly grant from the Department of Social Services, and pays \$250.00 per month rent. She receives no support from her husband. She is a first-year student at

Purchase University, Mt. Vernon Branch, and receives a full tuition, transportation and book expense scholarship. Like plaintiff STELLA PALMER, Mrs. Harding has not applied to Special Term for assignment of counsel under CPLR 1102(a).

35. CARLOTA BARRERA was married on December 16, 1962 in Guayaquil, Ecuador. There are two children of the marriage, twins, Carlos and Carlotta, born July 20, 1960. In addition, a third child, Narcisa Arevalo, 19, born of a prior union, has been legally adopted by her husband. Mrs. Barrera's sole source of income is a semi-monthly grant from the Department of Social Services in the amount of \$197.85. In June, 1975, she was served with a summons in an action for divorce in Supreme Court, Bronx County, by her husband, Urbano R. Barrera. Her husband is represented by an attorney in this action. The summons states that the action is based on a "constructive abandonment." No complaint has been served specifying the details of the claim. In any case, Mrs. Barrera does not consent to the divorce, and has a valid defense to her husband's claim, since in fact he abandoned her in September, 1971 without cause or provocation. She wants and needs the advice of an attorney to defend the action, and to assist her in deciding whether to interpose a counter-claim against her husband for a divorce, since in fact he

abandoned her. In addition, she wants alimony and child support from her husband. Despite numerous orders of the Family Court, Bronx County, directing him to support the family and to make up arrears in past support, he has not supported Mrs. Barrera or the children since July, 1973. Mrs. Barrera, who is a native of Ecuador, speaks no English. On June 17, 1973, her husband took her to the office of his attorney, Claude Henry Kleefield at 100 West 72 Street, New York, New York. She was asked to sign papers relating to the divorce but refused. She subsequently attempted to obtain the services of a lawyer through the New York and Bronx County Bar Association legal referral services, and through the various free legal services facilities in Bronx County, but without success. On June 15, 1975, with the assistance of the Bronx Neighborhood Office of The Legal Aid Society, she applied to the Supreme Court, Bronx County, for leave to defend the action as a poor person and for assignment of counsel pursuant to CPLR 1102(a). By order of the Court dated August 6, 1975 (copy attached) the motion was denied in all respects.

36. It is essential to all the plaintiffs that this Court resolve their federal constitutional claim of right to assigned counsel and grant the requested declaratory and

injunctive relief. Because the New York Court of Appeals has recently ruled that there is no constitutional right to assigned counsel for indigent divorce litigants (Matter of Smiley, 36 N.Y. 2d 433 (1975)), the plaintiffs are without a meaningful opportunity to obtain a timely hearing in the New York State Courts on their federal constitutional claim. Therefore, unless this Court acts to enforce their constitutional rights, the plaintiffs will be denied the assignment of counsel indefinitely, with the consequence of great and immediate injury to each of them.

37. Without the assignment of counsel to represent them none of the named plaintiffs can realistically prosecute or defend his or her divorce action; thus none of the prospective divorce plaintiffs (twelve of the thirteen named plaintiffs herein) has yet instituted his or her divorce action. Without the necessary assistance of counsel to represent them in the divorce actions, the named plaintiffs will, variously, continue to be subjected to actual or threatened physical abuse from a spouse, continue to lack funds necessary for support, and continue to suffer the unhappiness attendant upon being locked into untenable marriages. At the same time, young children will be left in a state of confusion and uncertainty and sometimes without money necessary for

their support. If the delay in the assignment of counsel, and hence in the prosecution of the divorce action, is continued too long, the divorce may be effectively defeated. Various of the plaintiffs' divorce actions rest on grounds of cruelty and/or adultery, to which apply a five-year statute of limitations. For some, delay may make problems of proof difficult or insuperable as memories fade and witnesses die or otherwise become unavailable.

STATEMENT OF CLAIMS

38. Plaintiffs and plaintiff class members as indigent divorce plaintiffs and defendants unable to obtain counsel are entitled under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to the assignment of counsel in divorce actions.

39. Plaintiffs and plaintiff class members as indigent divorce plaintiffs and defendants unable to obtain counsel are entitled under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to the assignment of counsel in divorce actions, since other similarly situated divorce plaintiffs and defendants obtain counsel through their own devices or through discretionary assignment of counsel pursuant to CPLR §1102(a), and since other indigent civil litigants will receive assignment of counsel as a matter of statutory right in many Family Court

proceedings and appeals which involve no more fundamentally important family interests than are at stake in divorce proceedings.

40. CPLR §1102(a), as applied to plaintiffs and plaintiff class members, is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it fails to guarantee the right to assigned counsel to indigent divorce plaintiffs and defendants unable to obtain counsel.

41. CPLR §1102(a), as applied to plaintiffs and plaintiff class members, is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it permits the denial of assignment of counsel to some indigent divorce plaintiffs and defendants while permitting the assignment of counsel to other similarly situated divorce plaintiffs and defendants, and in that Article IV, Part 6, of the New York Family Court Act will mandate assigned counsel to other indigent civil litigants in many Family Court proceedings and appeals which involve no more fundamentally important family interests than are at stake in divorce proceedings.

RELIEF REQUESTED

WHEREFORE, plaintiffs, on behalf of themselves and all the members of the class, respectfully pray that this Court:

1. Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284;
2. Determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;
3. Pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring that the plaintiffs and plaintiff class members as indigent divorce plaintiffs and defendants unable to obtain counsel have a constitutional right, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to the assignment of counsel in divorce actions, and that CPLR §1102(a), as applied to plaintiffs and plaintiff class members, is violative of the constitutional right to the assignment of counsel secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment for indigent divorce plaintiffs and defendants who are unable to obtain counsel.

4. Pursuant to 28 U.S.C. §2202 and Rule 65 of the Federal Rules of Civil Procedure enter a permanent injunction restraining the defendants, their officers, agents, servants, employees, and successors in office from refusing or failing to assign counsel to indigent plaintiffs and defendants in divorce actions who are unable to obtain counsel, and from enforcing, applying, or relying on CPLR §1102 (a) to refuse or fail to assign counsel for indigent divorce plaintiffs and defendants who are unable to obtain counsel.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiffs reasonable attorney's fees and their costs and disbursements herein and also grant them and the members of the class such additional and further relief as to this Court may seem just and equitable.

Dated: New York, New York
December 16, 1975

[signatures of plaintiffs' counsel omitted]

EXHIBIT A ANNEXED TO PLAINTIFFS' COMPLAINT--OPINION OF
JUSTICE COTTON IN MATTER OF BOYD

SUPREME COURT : BRONX COUNTY
SPECIAL TERM : PART I

-----X
In the Matter of the Applications of

BARBARA BOYD, HELEN JOHNSON, SHELLY
HUGHES, CARMEN CASTANEDA, RUTH HARGROVE,
JULIEN ANDUZE, ROSA CORREA, BRUNHILDA
CRUZ, MARGARET LOPEZ, LESLIE GARCIA,
MARGARET SPRUILL, MINNIE LEE JENKINS,
ANTONIA ORTIZ, MARIA TERESA NIEVES,
DAISY EVANS, DOMITILA LOPEZ, ARMANDO
VARGAS, FANNIE MOORE, YVONNE NIEVES,
GLORIA SIMONS, NATHANIEL DENNIS, NOEMI
TORRES, ROSA AGOSTO, CARMEN VIGO,
MARJORIE CROOM, MARIA SINCLAIR, CRYSTAL
BOYNES, JANNIE McDOLLE, LYDIA SANTIAGO,
SUZANNE DUNMORE, JANROSE REYNOLDS,
ENRIQUE SAVINOVICH, ANTONIA ST. HILARE,
LENNOX L. HOLMES, JACKIE DOCKERY, MARIA
CARDONA, LETICIA BRUNO, MARIA CRUZ,
MARGARET THOMPSON, FRANCISCO SEDA, DIANE
LEWIS, MONSERRATI ORTIZ, CARMEN FONTANEZ,
ANGELINA LUNA, AMPARO OWENS, CARLOS
RODRIGUEZ, BEVERLY LOVE, AWILDA CEDENO,
MARILYN HARRISON, VICTORIA QUINTANA, LUZ
VASQUEZ, SHIRLEY ANN GATEWOOD, JULIA
VILLALBA, IRMA JEAN WALTON, CAROL
CABALLERO, MIRIAM JOHNSON, ORINE COOPER,
DOREEN BYRNES, JUANITA RIVERA, GERALDO
RAMIREZ and CHARLENE HERRING,

To Sue as Poor Persons and for Assignment
of Counsel Pursuant to Article 11 of the
Civil Practice Law and Rules.

-----X
COTTON, J.:

The Court has been asked to rule on 61 ex parte
applications by residents of Bronx County for permission to proceed
as plaintiffs in actions for divorce as poor persons pursuant
to Article 11 of the Civil Practice Law and Rules, and for

assignment of counsel to advise and represent them in such actions without fee. While each of the applications arises out of an independent and unrelated factual context, the operative facts and the legal issues presented are shared in common by all of them, and accordingly they are consolidated herein for disposition.

The applications, which have been prepared and submitted pro se with the help of The Legal Aid Society, are in substantially the same form. Each is supported by an affidavit of the applicant setting forth his or her ¹ name and address; the date and place of marriage; the names and ages of minor children of the marriage if any; the amount and sources of income and property; a statement showing the duration of residency in New York State; a statement of facts showing a cause of action for divorce; and an account of the applicant's unsuccessful efforts to obtain counsel for the purpose of initiating an action for divorce.

Accompanying each of the applications is an affirmation by the Attorney-in-Charge of The Legal Aid Society's Bronx Neighborhood Office, stating in each case that he has examined the facts and believes there is merit to the proposed action; and that while the applicant qualifies financially for the free legal services of the Society, the office is unable to accept the case by reason of a lack of resources and personnel.

The Court has examined the affidavits of each of the

¹ Fifty-three of the applicants are women; eight are men.

applicants, and finds that, in every case, a proper showing of entitlement to poor person relief under CPLR 1101 has been made. Thirty-nine of the 61 applicants receive state public assistance benefits in the Aid to Dependent Children (ADC) category as their sole source of income; three are recipients solely of federal Supplementary Security Income (SSI); nine receive only state unemployment insurance benefits; and various others receive supplemental public assistance in combination with: SSI (2) unemployment insurance benefits (1); part-time employment (1); and court-ordered child support payments (3). In addition, one applicant subsists on a union retirement pension; another is employed as a housekeeper in a private home at a wage of \$90. per week, and one has no independent income of her own but is supported by a relative. The Court finds that none of the applicants is able to pay the costs, fees and expenses necessary to prosecute the proposed actions.

Further, each of the applications sets forth sufficient facts so that the merit of the contentions can be ascertained. On their face, the applications demonstrate both jurisdiction and legal grounds to institute actions for divorce. With respect to jurisdiction to maintain an action, each one of the 61 applicants has resided in the State of New York for more than 2 years (Domestic Relations Law, §230[5]). With regard to legal grounds (D.R.L. §170), each of the affidavits sets forth facts that constitute a prima facie showing of a meritorious cause of action on the basis either of cruel and inhuman treatment (20 cases);

abandonment for one or more years (33 cases); abandonment and cruelty (5 cases); confinement of the defendant in prison for three or more years after the marriage (1 case); cruelty and adultery by the defendant (1 case); and abandonment and adultery by the defendant (1 case).

Accordingly, the applications are granted to the extent that the parties are permitted to proceed as poor persons pursuant to CPLR Article 11. The Clerk of the Court is directed to make no charge with respect to the prosecution of their respective actions, and is directed to issue index numbers for each of the actions without charge therefor (CPLR 1102[d]).

The requests for assignment of counsel, however, present other and more far-reaching considerations. The poor person statute expressly authorizes an assignment of an attorney (CPLR 1102 [a]), and such assignments have recently been held by the Court of Appeals to lie within the "broad discretionary power" of the Court in matrimonial actions (Matter of Smiley, 36 N Y 2d 433, 441 [1975]).

Unquestionably, the assistance of counsel is necessary for these prospective matrimonial litigants. In divorce actions, parties are almost invariably represented by counsel, and with good reason. The procedural steps necessary to prosecute a matrimonial action--even an undefended one--are numerous and complex; formal rules of evidence are in force at trial; litigants may lose important substantive and procedural rights if not timely

and effectively trained; and proof requirements are more stringent than in other kinds of civil proceedings. According to the affidavits of the 61 applicants, none has legal training or experience, and it is safe to conclude that not one of them is knowledgeable of the procedures necessary to follow in the prosecution of a divorce action. In any event none would be able to handle those procedures pro se if called upon to do so. The preparation, serving and filing of the necessary papers alone is surely beyond their grasp--those papers include the summons; complaint; reply to counterclaim (if any); demand for bill of particulars (if appropriate); pre-trial motions, as for temporary alimony or child support; note of issue; affidavit of regularity; certificate of dissolution; and findings of fact, conclusions of law and proposed judgment.

It is the opinion of this court that assistance of counsel is particularly important in matrimonial proceedings not only to protect the parties in any litigation but in any settlement negotiations regarding child custody and child support as well (cf. Matter of Ella B., 30 N Y 2d 352 [1972]). Such questions are likely to arise in a significant proportion of the cases at bar. Among the 61 applicants, only five have no minor children of the marriage. Twenty-three of the applicants have one child; 16 have two; 11 have three; one has four; two have five; one has six; and two have nine minor children born of the

marriage.²

The Court further notes that in eleven of the 61 cases at bar, a circumstance exists which makes the need for counsel even more compelling--the applicant's inability to speak or read the English language.³ For these prospective litigants, the prospect of attempting to proceed without counsel, to prepare and file papers in the English language, as required by CPLR 2102(b), is effectively foreclosed.

The record establishes that each of these matrimonial litigants has been wholly unsuccessful in obtaining counsel by his or her own devices, notwithstanding substantial and diligent efforts to that end. Each has requested to be referred to a private attorney by the legal referral services of the Bronx County Bar Association and the New York County Bar Association. They were informed by both referral services that no referral could be made because they cannot afford to pay a fee.

Next, the petitioners turned to the federally funded legal services offices in Bronx County which render free assistance to individuals who are unable to retain private counsel. They requested the assistance of South Bronx Legal Services at 579 Courtlandt Avenue, and Morrisania Legal Services

² These totals do not include children not of the marriage or children over 21, the age of majority for purposes of parental duty to support (D.R.L. §32).

³ Certificates of Spanish/English translation are annexed to the affidavits of Luz Vasquez, Awilda Cedeno, Carmen Fontanez, Maria Cardona, Antonia St. Hilare, Leslie Garcia, Maria-Teresa Nieves, Domitila Lopez, Roemi Torres, Enrique Savinovich and Geraldo Ramirez.

at 1438 Boston Road, in the Bronx. Both services told the applicants they do not handle divorce cases.

Finally, the petitioners sought the assistance of The Legal Aid Society, at 1029 East 163rd Street, Bronx. This office does accept cases of the type presented here; indeed it maintains a substantial docket of matrimonial matters in this Court totalling hundreds of cases each year. It is apparently the only facility in Bronx County presently rendering free legal assistance in divorce matters. Each of the applicants was informed at this office that while he or she is financially eligible for the services of the office, it is unable to accept the case because of its large existing caseload, and its lack of resources and manpower to accept additional cases.

The Attorney-in-Charge of The Legal Aid Society's Bronx office has submitted an affirmation with each of the applications, which further details the inability of the office to accept the cases at bar. With a current active docket in excess of 300 matrimonial matters, the office has a waiting list of over 600 other individuals who have been given appointments, at the rate of 20 per week, through the months of February 1976. In addition, the 10-attorney office handles a large volume of other civil matters such as housing and welfare problems, social security cases, employment matters and consumer cases. The affirmation concludes with an unequivocal statement of inability to accept the cases, consistent with the disciplinary rules of the Canons of Professional Responsibility that forbids the acceptance of a case to which an

attorney cannot devote full attention, and that requires full preparation to be given to those cases for which responsibility has been undertaken (DR 6-101). Under these circumstances, it would be an improvident exercise of discretion to impose an involuntary assignment of these cases upon the Society (Vanderpool v. Vanderpool, 40 A D 2d 1020 [2nd Dept. 1972]; Cerami v. Cerami, 44 A D 2d 890[4th Dept. 1974]).

Further, it is not a realistic option to compel members of the private bar of this County to accept assignment of these cases. If it were a matter of one or two applications, the Court would have no hesitancy in doing so; but in the absence of statutorily authorized compensation for the services of private attorneys (see Matter of Smiley, supra, 36 N Y 2d 433, 438), it would impose an intolerable burden on the Bronx matrimonial bar to assign such cases in the volume presented here. Alternatively, to assign some of the cases and not others would be manifestly unfair, since all appear on their face to be equally meritorious. Moreover, the Court has been advised by the Legal Aid Society that many more hundreds of Bronx residents in addition to the 61 individuals at bar, would presently qualify for the same relief sought by these applicants, and these other individuals would undoubtedly meet with the same dilemma of being unable to obtain the assistance of counsel. The situation is an unfortunate reflection of the chronically inadequate legal services resources available to the indigent population of the Bronx.

Article II of the CPLR, as construed by the Court of Appeals in Matter of Smiley, supra, affords no absolute right to assignment of counsel in a poor person application. It does

give the court broad discretionary power to assign counsel on an uncompensated basis in appropriate circumstances. As detailed above, each of these litigants has demonstrated a need for counsel, which he or she will be unable to secure without the Court's assistance. Unfortunately, the reality is that in the absence of public compensation for the assistance of attorneys in such cases, the resources of legal aid services and the private bar are presently inadequate to deal with the problem. The Court is therefore reluctantly constrained to deny that part of the applications that seeks assignment of counsel.

In denying the requested assignment, the Court is fully aware of the serious consequences that may result from delay in the prosecution of the intended actions. With the passage of time facts become more difficult of proof, witnesses become unavailable, and statutes of limitation run.⁴ Moreover, as long as these prospective litigants are without counsel, and consequently foreclosed from the exclusive remedy available to them, it will be difficult or impossible for them to settle and stabilize their fundamental family relationships, make fresh starts and seek new directions in their lives. The cost, in both personal and social terms, is substantial. Among the 39 women in this group of applicants who subsist on public welfare benefits, for example, there are perhaps some for whom a delay in the dissolution of an

⁴ A five-year statute of limitations applies to causes of action for cruelty, imprisonment and adultery, asserted by 27 of these applicants (D.R.L. §210[a]).

already dead marriage prevents them from entering into a re-marriage that may offer an opportunity to break out of the cycle of welfare dependency.

In conclusion, it may be noted that these petitioners have not urged upon this Court the argument that they are entitled to assigned counsel as a matter of constitutional right. Had they done so, the Court would have been constrained to reject that argument, under the majority holding of *Matter of Smiley*, *supra*.

Appropriate orders signed.

Dated: October , 1975.



J. S. C.

EXHIBIT B ANNEXED TO PLAINTIFFS' COMPLAINT--DECISION OF
JUSTICE CALLAHAN

NEW YORK SUPREME COURT—COUNTY OF BRONX

SPECIAL LOCAL PART 1.

URBANO RUFINO BARRERA

Index Number

1673

Present:

Alfred J. Callahan

Hon.

Justice

CARLOTA GRISELDA BARRERA

The following papers numbered 1 to 7

read on this motion submitted

this 5 day of August 1975

Calendar No. 25

Notice of Motion and Affidavits Annexed.....	1-5
Clerk Order to Show Cause and Affidavits Annexed.....	6-7
Answering Affidavits.....	
Replying Affidavits.....	
Affidavits.....	
Filed Papers (County Clerk's Office).....	
Notice of Examination and Pleadings.....	
Exhibits.....	
Referee's Report.....	
Stipulation.....	

AFFIDAVIT OF MICHAEL D. HAMPDEN SUBMITTED IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS ACTION CERTIFICATION

[caption omitted]

STATE OF NEW YORK)
 : ss.:
COUNTY OF BRONX)

MICHAEL D. HAMPDEN, being duly sworn, deposes and
says:

1. I am the Attorney-in-Charge of The Legal Aid
Society's Bronx Neighborhood Office and am one of the
attorneys of record for plaintiffs in this action. I
make this affidavit in support of that part of this motion
that seeks certification of the action as a class action
pursuant to Rule 23 of the Federal Rules of Civil Procedure.

2. From my experiences as the attorney-in-charge
of The Bronx Neighborhood Office of The Legal Aid Society,
I am able to estimate the number of actual and potential
divorce litigants in the Bronx who cannot afford to retain
counsel for the prosecution or defense of their actions.
As will be more fully detailed herein, there exists a
substantial unmet need in Bronx County for legal assistance
to indigent litigants in divorce actions.

3. The Bronx Neighborhood Office of the Legal Aid Society is the only legal services facility in the borough rendering assistance in matrimonial matters. While there are two other legal services offices in Bronx County, they do not accept clients for divorce, annulment or separation actions. Bronx residents who make inquiry to any of the two other offices are thus invariably referred to this office, as are the hundreds of others who first look for assistance to community organizations, governmental agencies, or the Court itself.

4. Because the indigent population of the Bronx cannot turn elsewhere for legal assistance in matrimonial matters, and because those matters are of such fundamental importance to the persons affected, our office of nine attorneys has undertaken a large number of divorce cases—so many, in fact, that we have strained our limited capacity. The office currently has an open docket in excess of 300 matrimonial matters. We have a waiting list of hundreds of other individuals who have been given appointments, at the rate of 20 per week, through February, 1976. In addition, the office handles a large volume of other civil matters in which legal representation is also vitally

needed, including housing and welfare problems, social security cases, employment matters, consumer cases and the like.

5. Notwithstanding the size of the matrimonial caseload of the Bronx office (approximately 1000 per year) we cannot begin to meet the demand by Bronx residents for legal representation in such matters. Each week, we must turn away approximately 175 to 200 telephone and in-person requests for legal representation in an action for divorce by individuals who otherwise qualify for the free legal assistance of the office. In the course of a year, therefore, approximately 8,750 to 10,000 individuals must be denied service despite their financial eligibility to receive it.

6. Our office cannot hope to accept as clients any more than a small fraction of those Bronx residents in need of our services. The experience of the office has shown us that, at our present manpower level, we can accept no more than 20 new divorce cases per week, or a total of approximately 1000 per year. During the course of a pre-arranged one-week intake period, all eligible individuals who appear personally at the office are given appointments on a first-

come, first-served basis at the rate of 20 per week for as many successive weeks as are necessary to accommodate every prospective client. After the one-week intake period, no new cases are accepted until the current appointment list is completed, whereupon the cycle is begun again with a new list. The most recent intake week occurred on June 23-June 27, 1975; during that 5-day period approximately 600 financially eligible Bronx residents were given appointments from that time through the month of February, 1976.

No new cases have been accepted since that time, and none can be accepted until March 1976 at the earliest. During this period while the waiting list is being reduced, every one of the approximately 200 persons per week who calls to request our service in a divorce case is informed that no consideration can be given to the case before March 1976. Every one of these individuals would be an appropriate named plaintiff or intervenor in this federal action. Moreover, we can predict from experience that in the weeks following our anticipated March intake week, hundreds of additional persons will request the assistance of the office, and these hundreds will of necessity be refused for many more months thereafter.

WHEREFORE, I respectfully submit that, in view of the foregoing, it is evident that the class herein is so numerous that joinder of all members is impracticable; that the "numerosity" requirement of Rule 23(a)(1) is therefore met in this action; and that the motion herein to certify this action as a class action should in all respects be granted.

Michael D. Hampden
MICHAEL D. HAMPDEN

Sworn to before me this
4th day of December 1975.

Ian F. Feldman

IAN F. FELDMAN
Notary Public, State of New York
No. 60-1185000
Qualified in Westchester County
Term Expires March 30, 1977

AFFIDAVIT OF ROSALIND FINK IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS COMPLAINT

[caption omitted]

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ROSALIND FINK, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of
LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
and attorney for defendants herein.

I make this affidavit in support of defendants' motion
to dismiss the complaint herein against them for failure to
present a claim upon which relief can be granted or over
which this Court has jurisdiction, and in opposition to plain-
tiffs' motions for convening of a three-judge court and class
action certification.

In July and August, 1975, 61 indigent persons seeking
to institute divorce proceedings applied to the Supreme Court,
Bronx County, for assignment of counsel pursuant to CPLR 1102(a).

The applications were consolidated and, despite a finding that "the assistance of counsel is necessary" for each of them, their requests for appointed counsel were refused. Matter of Boyd, N.Y.L.J. Nov. 6, 1975, p. 10, col. 2 (October 31, 1975) (Cotton, J.).

Justice Cotton's refusal to appoint counsel was based on his finding that "in the absence of public compensation for the assistance of attorneys...the resources of Legal Aid services and the private Bar are presently inadequate to deal with the problem."

His decision was also presumably based on his belief that the Boyd plaintiffs had no constitutionally guaranteed right to counsel:

In conclusion, it may be noted that these petitioners have not urged upon this Court the argument that they are entitled to assigned counsel as a matter of constitutional right. Had they done so, the Court would have been constrained to reject that argument, under the majority holding of Matter of Smiley, supra.

While defendants contend that Justice Cotton's refusal to recognize any constitutional right of the Boyd plaintiffs to counsel was correct, they believe that the ultimate decision he reached was not.

No state court appeal was taken from that decision, however.

Instead, ten of the Boyd plaintiffs-- Barbara Boyd, Naomi Torres, Carmen Vigo, Helen Johnson, Carmen Casteneda, Awilda Cedeno, Rosa Agosto, Mariam Johnson, Francisco Seda and Gloria Simons--along with three other indigent persons, instituted this action under the Civil Rights Acts, 42 U.S.C. 51983 et seq., alleging violations of their constitutional rights arising from the application of CPLR 1102(a) to them and to other indigent divorce litigants in Bronx County who are unable to obtain counsel, which class of persons they seek to represent. As relief, they seek a declaration of the unconstitutionality of CPLR 1102(a) as applied to them and to members of their alleged class.

While the first ten plaintiffs were in fact denied assigned counsel by the judicial decision of Justice Cotton, plaintiffs Stella Palmer and Valeria Harding never even applied for assigned counsel pursuant to CPLR 1102(a).

Defendants contend that, absent allegations that they sought, and were denied assigned counsel pursuant to CPLR 1102(a), these two plaintiffs cannot claim that New York, by operation of that statute, has denied them their right to counsel.

The thirteenth plaintiff, Carlota Barrera, is the defendant in a divorce action brought by her husband, who is represented by private counsel in that action. Although she was denied assigned counsel pursuant to CPLR 1102(a), she had the right, under Domestic Relations Law §237, to move for an order requiring her husband to pay for her counsel fees. Plaintiff Barrera makes no allegation that she sought such an order. Defendants contend that, absent a showing that she sought and was denied relief pursuant to DRL §237, she cannot claim that she, like the first ten named plaintiffs herein, is "unable to obtain counsel", nor may she claim that New York, by CPLR 1102(a) or any other statute, has denied her her right to counsel.

Defendants believe that this action, even if brought only by the first ten named plaintiffs, is not cognizable under the Civil Rights Acts.

They argue that CPLR 1102(a) was applied to plaintiffs by the judicial decision of a single state Supreme Court justice in a single action, and the application — as well as the mis-application — of a statute by a state court judge, acting in his judicial capacity, is not "state action" for purposes of the Civil Rights Acts. Remedy for a state judge's alleged error, including his alleged failure to declare a

state statute violative of the Fourteenth Amendment, lies solely through the state appellate process, not through a planary action in the federal courts.

It is further argued that the doctrine of res judicata and the related Booker doctrine bar Civil Rights actions arising out of judicial decisions of state court judges, even if those decisions interpreted a state law in such a manner as to in fact deprive plaintiffs of their constitutional rights.

Defendants also argue that, even if CPLR 1102(a) were systematically applied to members of the purported class in the manner plaintiffs allege, such application would still be the result of decisions made by judges acting in their judicial capacity. These decisions, even when aggregated, still could not constitute "state action" for purposes of the Civil Rights Acts.

In support of their arguments, defendants contend that relief for the Boyd plaintiffs was available in the State Appellate Courts, as Matter of Boyd was incorrectly decided.

One of the challenged findings in that case is Justice Cotton's finding that the resources of the Bronx Bar were inadequate to meet the Boyd plaintiffs' need for counsel. A conversation I had with Mrs. Esther Kerrigan, Secretary of the Bronx County Bar Association on January 29, 1976 revealed that the Association has between 1400 and 1500 members; defend-

ants contend that, under applicable case law and Ethical Considerations 2-25 and 2-29, Canon 2 of the Code of Professional Responsibility, adopted by the New York State Bar Association and contained in the Supplement to McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, any of these persons assigned to represent a Boyd plaintiff would have been obligated to accept such an assignment, absent a showing of either "compelling reasons" (EC 2-29) or "previously arranged professional commitments."

Another challenged finding concerns the need of the Boyd plaintiffs for counsel. I have read the form affidavits of the ten named plaintiffs herein, and believe that the conclusory statements of each of these persons concerning their inability to proceed pro se are insufficient to support Justice Cotton's finding that the assistance of an attorney was necessary for each plaintiff.

While it is contended that the complaint herein should be dismissed on jurisdictional grounds, plaintiffs' requests for class certification and convening of a three-judge court will also be discussed.

Plaintiffs seek to represent a class consisting of all indigent divorce litigants unable to obtain counsel in Bronx County. However, certification of such a class is believed to violate the fundamental principle of constitutional law that challenges to the application of a state statute may

be brought only by, and on behalf of, persons actually aggrieved by that application of the statute in question.

It is therefore contended that plaintiffs' grievance against CPLR 1102(a), if cognizable at all, must be based on the actual application of the statute to these plaintiffs, and consequently must be limited to the interpretation of this statute made by Justice Cotton in Matter of Boyd. His interpretation, that CPLR 1102(a) permits him to deny counsel to indigent matrimonial plaintiffs in need of counsel on the ground that, absent compensation for such assignments, the resources of the private Bar are inadequate to meet their needs for counsel, thus is believed to define what would be the proper scope of plaintiffs' challenge to this statute. It is argued that the question of the constitutionality of CPLR 1102(a) as applied to indigent matrimonial litigants denied assigned counsel in other situations, e.g. upon findings that they either were not in need of counsel, or were in need of counsel but counsel could not be assigned for reasons other than those given by Justice Cotton, such as the availability of payment for retained counsel under DRL §237, may not be raised by plaintiffs herein.

Plaintiffs make no allegations showing the existence of persons (other than the remaining 51 plaintiffs in Boyd) similarly situated to them -- i.e., other indigent divorce plaintiffs who have sought assigned counsel under CPLR 1102(a),

who have been found to need such counsel, and who have been denied counsel on Justice Cotton's grounds. Nor do they allege facts showing that Justice Cotton himself, or any other justice authorized to assign counsel pursuant to CPLR 1102(a), has engaged in a pattern or practice of declining to assign counsel to indigent divorce plaintiffs needing such counsel on the ground that absent compensation for such assignments the resources of the private Bar are inadequate to meet the need of the plaintiffs for counsel. It is therefore argued that the proper plaintiffs would at most be those persons affected by the decision in Matter of Boyd, the 61 plaintiffs therein.

However, certification of a class consisting of the 61 plaintiffs in Boyd is believed to be unwarranted, both because plaintiffs would have little chance of success on the merits of their constitutional claim, and because a judgment in plaintiffs' favor for declaratory and injunctive relief, however unlikely, would automatically run to the benefit, not only of the named plaintiffs, but of all persons similarly situated, and class certification has consistently been denied in this Circuit when the ultimate judgment would have this effect.

A three-judge court is believed unwarranted herein because the constitutional claims of plaintiffs, even if cognizable by this Court, are insubstantial.

For these reasons, defendants respectfully request that their motion to dismiss the complaint herein be granted,

and that plaintiffs' requests for class certification and convening of a three-judge court be denied.

Rosalind Fink
ROSALIND FINK

Sworn to before me this
3rd day of February, 1976.

William A. Miller
Assistant Attorney General
of the State of New York

DECISION AND ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BARBARA BOYD, et al., :

Plaintiffs, :

-against- :

JUSTICES OF SPECIAL TERM, PART I, :
OF THE NEW YORK STATE SUPREME COURT, :
BRONX COUNTY, et al., :

Defendants. :

MEMORANDUM AND-ORDER

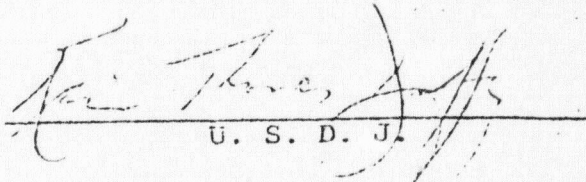
75 Civ. 6280 KTD

-----x
KEVIN THOMAS DUFFY, D.J.

The complainants have moved for class determination and for a ruling that the defendants must appoint attorneys for indigents involved in divorce proceedings.

The Attorney General has informed me that New York State law already provides for the relief which the plaintiffs seek. It would appear therefore that there is not a case or controversy and, accordingly, the matter is dismissed.

IT IS SO ORDERED.



U. S. D. J.

Dated: New York, New York

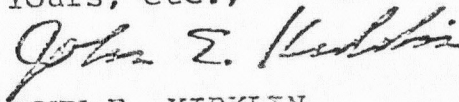
April 20, 1976.

PLAINTIFFS' NOTICE OF APPEAL [CAPTION OMITTED]

Notice is hereby given that Barbara Boyd, Noemi Torres, Carmen Vigo, Helen Johnson, Carmen Castaneda, Awilda Cedeno, Rosa Agosto, Mariam Johnson, Francisco Seda, Gloria Simons, Stella Palmer, Valeria Harding, Carlota Barrera, the plaintiffs above named, on behalf of themselves and all others similarly situated, hereby appeal to the United States Court of Appeals for the Second Circuit from the order in the above-entitled action dated and entered April 20, 1976, dismissing the plaintiffs' action for lack of a case or controversy.

Dated: New York, New York
May 13, 1976

Yours, etc.,



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